

Page 86	Page 88
<p>CPD</p> <p>1 PI Trust will become the insured under</p> <p>2 the policies that are listed on Schedule</p> <p>3 1 to this agreement?</p> <p>4 MR. GUY: Objection, calls</p>	<p>CPD</p> <p>1 that's responsive to your</p> <p>2 question.</p> <p>3 BY MR. BROWN:</p>
<p>CPD</p> <p>5 for a legal conclusion.</p> <p>6 THE WITNESS: Mr. Brown, I</p> <p>7 don't know. I certainly hope so.</p> <p>8 BY MR. BROWN:</p>	<p>5 Q. What is it going to do?</p> <p>6 What is the Trust going to do?</p> <p>7 MS. BAER: Objection to</p> <p>8 form.</p>
<p>9 Q. Do you have an understanding</p> <p>10 as to what, if anything, happens to the</p> <p>11 obligations of the insured under the</p> <p>12 policies on Schedule 1 if the Plan is</p> <p>13 confirmed?</p>	<p>9 MR. LIESEMER: I join.</p> <p>10 THE WITNESS: It's going to</p> <p>11 settle claims pursuant to the</p> <p>12 Trust Distrubution Process.</p>
<p>CPD</p> <p>14 MR. GUY: Objection to form.</p> <p>15 MR. LIESEMER: I join in</p> <p>16 that objection.</p> <p>17 THE WITNESS: Let me make</p>	<p>13 Q. Okay. Will the Debtors'</p> <p>14 insurers have any role in the handling</p> <p>15 defense or settlement of any claim</p> <p>16 submitted to the Asbestos PI Trust?</p>
<p>18 sure I understand the question.</p> <p>19 What happens to the obligations of</p> <p>20 -- if the policy was still in the</p> <p>21 hands of the Debtor, what would</p> <p>22 happen to the obligations of the</p>	<p>17 MR. GUY: Objection.</p> <p>18 MR. LIESEMER: Objection to</p> <p>19 form.</p> <p>20 MR. GUY: Objection, calls</p>
<p>23 Debtor and the rights of the</p> <p>24 insurance company?</p>	<p>21 for speculation.</p> <p>22 MS. BAER: Objection, same.</p> <p>23 THE WITNESS: Let me address</p> <p>24 audit rights. In my copious free</p>
Page 87	Page 89
<p>CPD</p> <p>1 BY MR. BROWN:</p> <p>2 Q. I am not sure I understood</p> <p>3 the qualification. Let me try it a</p> <p>4 little differently.</p>	<p>CPD</p> <p>1 time, Mr. Brown, I am the claims</p> <p>2 administrator of the Dow Corning</p> <p>3 Trust -- that is not an asbestos</p>
<p>5 To the extent that the</p> <p>6 Debtor has duties and obligations under</p> <p>7 one or more of its insurance policies, if</p> <p>8 this Plan is confirmed, what happens to</p> <p>9 those duties and obligations, as you</p> <p>10 understand it?</p>	<p>4 Trust -- and this issue has arisen</p> <p>5 in that context. And I dare say</p> <p>6 it may arise in the context of the</p> <p>7 W.R. Grace Trust.</p>
<p>11 MR. LIESEMER: Object to the</p> <p>12 form.</p> <p>13 MS. BAER: I join in the</p> <p>14 objection.</p> <p>15 THE WITNESS: The Plan is</p>	<p>8 If insurance companies</p> <p>9 object to paying because they do</p> <p>10 not have audit rights or because</p> <p>11 of any other input into the Trust,</p>
<p>16 going to be administered pursuant</p> <p>17 to the Trust Distrubution Process</p> <p>18 as it affects personal injury</p> <p>19 asbestos claims.</p> <p>20 To that extent, the personal</p>	<p>12 I dare say they are going to bring</p> <p>13 that to the attention of the</p> <p>14 trustees. And either that will be</p> <p>15 worked out between the trustees</p>

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LPO

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PP
Obj:
R;
BE

1 back the question?
2 (The reporter read from the
3 record as requested.)
4 BY MR. BROWN:
5 Q. Other than what you just
6 described, will the Debtors' insurers
7 have any role in the handling defense or
8 settlement of asbestos PI claims into the
9 Trust?

PP
Obj:
R;
BE;
F;
S

10 MR. GUY: Same objection as
11 to speculation.

12 MR. LIESEMER: Same
13 objection.

14 MS. BAER: Same.

15 THE WITNESS: I don't know
16 what the trustees are going to do
17 about that, so I don't know.

PP
Obj:
R;
BE;
F;
S

18 MR. BROWN: Why don't we
19 take five minutes.

20 (There was a break from
21 11:46 a.m. to 11:57 a.m.)

22 MR. BROWN: Let's go ahead
23 and mark this document.

24 (Austern-5 marked for

1 A. No.
2 Q. Is there a reason for that?
3 A. I don't know.
4 MR. BROWN: All right.
5 Let's mark this.
6 (Austern-6 marked for
7 identification at this time.)
8 BY MR. BROWN:

9 Q. Mr. Austern, you have

10 another document in front of you now
11 marked Austern-6. It's Exhibit 10 to the
12 Exhibit Book.

13 Can you identify this
14 development?

15 A. It is the Cooperation
16 Agreement between the Debtor and others.

17 Q. And, again, this is one of
18 the documents that you reviewed in
19 preparation for today's deposition,
20 correct?

21 A. I don't remember if I
22 specifically did it for that purpose, but
23 I have certainly reviewed it in the past.

24 Q. Okay. What is the purpose

PP
Obj:
RPP
Obj:
R;
BE

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PP
Obj:
R;
BE

1 identification at this time.)
2 BY MR. BROWN:
3 Q. Mr. Austern, you have been
4 handed what's been marked Austern-5.
5 It's Exhibit 4 to the Exhibit Book.

6 Can you identify it?

7 A. This is the TDP for the
8 Plan.

9 Q. I am correct, am I not, that
10 this is one of the documents that you
11 reviewed in preparation for today's
12 deposition?

13 A. Yes.

14 Q. Are you aware of any
15 provision in the TDP or the Trust
16 Agreement that we spoke about earlier
17 that provides for any role for the
18 Debtors' insurers in the handling,
19 defense, or settlement of any asbestos
20 claims submitted to the Trust?

21 A. No.

22 Q. Are you aware of any other
23 Plan document that provides for such a
24 role?

PP
Obj:
RPP
Obj:
R;
BE

1 of this document?

2 A. I am not sure I know the
3 legal purpose. It creates certain rights
4 and obligations between and among some of
5 the parties.

6 Q. Okay. And who are those
7 parties?

8 A. Well, the Debtor, the
9 Reorganized Debtor, and the Trust. I
10 mean the personal injury Trust.

11 Q. The Debtors' insurers are
12 not a party to this agreement, correct?

13 A. No.

14 Q. We talked a little bit
15 earlier about general liability insurance
16 policies.

17 Are you generally familiar
18 with what's called duty to cooperate in a
19 general liability policy on the part of
20 the insured?

21 A. Generally.

22 MR. LIESEMER: Objection to
23 form.

24 BY MR. BROWN:

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Trav.

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Q. If the Joint Plan is confirmed and if there is a duty to cooperate under a given policy, what happens to that duty?

MR. GUY: Objection, calls for speculation.

THE WITNESS: Well, the proceeds of the policy have been transferred to the Personal Injury Trust. I don't know what happens to the duty of the Trust standing in the shoes of the Debtor.

BY MR. BROWN:

Q. So you don't know whether the Trust steps into the shoes of the Debtor with respect to the Debtors' obligations under the policy; is that what your telling me?

A. I don't know.

MR. BROWN: I think I am going to pass you to the next questioner, Mr. Austern. Thank you. Subject to maybe a few follow-ups, I am finished.

Exhibit-4, which is the Transfer Agreement, and look at Schedules 2 and 3?

A. (Witness complies with request.)

Q. Correct me if I'm wrong, I believe you said you weren't sure what the difference was between Schedules 2 and 3?

A. In the sense that I don't know why there are two schedules. I mean, clearly different people are listed under certain schedules.

Q. Do you have an understanding that the types of settlement agreements are different on Schedule 2 and Schedule 3?

A. I assume that's why there are two schedules.

Q. You previously also mentioned that you understood that there were three types of insurance agreements; there were settlements -- there were settled insurers, there were unsettled insurers, and there were insurers are

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EXAMINATION

BY MS. ALCABES:

Q. Hello, Mr. Austern. My name is Elisa Alcabes from Simpson Thacher & Bartlett. I am counsel for Travelers Casualty and Surety Company.

Travelers served a Notice of Deposition on you. I am just going to have that marked.

(Austern-7 marked for identification at this time.)

BY MS. ALCABES:

Q. Do you recall seeing this notice?

A. I saw many notices. I don't know if I saw this one.

Q. Okay. And are you familiar at all with any of the agreements between Travelers and W.R. Grace that were entered into pre-petition?

A. No.

Q. Can you turn to Austern

coverage in place agreements or reimbursement agreements? I am not sure I said that exactly right.

I believe you said you understood there were three types of settled insurers -- three types of insurers. I have got it right now. Three types of insurers.

There are unsettled insurers, fully settled insurers, and insurers with coverage in place or reimbursement agreements; is that right?

A. That is my understanding.

Q. And that's how you understand this Plan to operate; is that correct?

A. Yes.

Q. Okay. So do you understand that Schedule 2 lists the fully settled insurers, the insurers that have fully settled agreements?

A. What do you mean by fully?

Q. Fully paid settlement agreements.

25 (Pages 94 to 97)

<p>Trav.</p> <p>Page 98</p> <p>1 A. I don't know that that they</p> <p>2 are all fully paid. They are certainly</p> <p>3 all fully settled.</p> <p>4 Q. What is your understanding</p> <p>5 of Schedule 3, if any?</p> <p>6 A. That they are reimbursement</p> <p>7 agreements or coverage in place</p> <p>8 agreements.</p> <p>9 Q. Do you have a general</p> <p>10 understanding of what a reimbursement</p> <p>11 agreement or coverage in place agreement</p> <p>12 is?</p> <p>13 A. A very general</p> <p>14 understanding.</p> <p>15 Q. What's your very general</p> <p>16 understanding?</p> <p>17 A. That there is an agreement</p> <p>18 between the insured and the insurance</p> <p>19 company and that agreement determines</p> <p>20 that certain monies will be paid --</p> <p>21 forgetting what's in the policy for a</p> <p>22 moment, that certain insurance will be</p> <p>23 paid under certain circumstances over a</p> <p>24 discrete period of time.</p> <p>PP Obj: R; BE</p>	<p>Trav.</p> <p>Page 100</p> <p>1 A. Yes.</p> <p>2 Q. Will you be involved in any</p> <p>3 way in the performance of any obligations</p> <p>4 under reimbursement agreements?</p> <p>5 A. By whom?</p> <p>6 Q. By the Trust.</p> <p>7 A. If I am asked, but the</p> <p>8 trustees are going to have to decide what</p> <p>9 that is.</p> <p>10 Q. In your experience in other</p> <p>11 cases, have you ever been asked to</p> <p>12 participate in the analysis of coverage</p> <p>13 in place agreements?</p> <p>14 A. No.</p> <p>15 Q. And if a dispute were to</p> <p>16 arise with respect to coverage in place</p> <p>17 agreements in the Grace Trust, what will</p> <p>18 your role be?</p> <p>19 A. Okay.</p> <p>20 Q. If you know.</p> <p>21 A. I will tell you what I would</p> <p>22 like it to be.</p> <p>23 Q. Okay.</p> <p>24 A. Trustees and insurance</p> <p>PP Obj: R; BE</p> <p>PP Obj: R; S</p>
<p>Trav.</p> <p>Page 99</p> <p>1 Q. Now, as the Future Claim</p> <p>2 Representative, do you agree that</p> <p>3 reimbursement agreements are a source of</p> <p>4 potential payment for future claimants?</p> <p>5 A. It's a source of the</p> <p>6 insurance payments, yes.</p> <p>7 Q. And do you have the same</p> <p>8 understanding for the agreements that are</p> <p>9 listed on Schedule 2, where the payments</p> <p>10 have been fully made prior to the</p> <p>11 petition date?</p> <p>12 A. Well, I am familiar with the</p> <p>13 Lloyd's payment. I don't know that I am</p> <p>14 familiar with necessarily any other</p> <p>15 payments.</p> <p>16 Q. But you do understand that</p> <p>17 under -- and, by the way, when you refer</p> <p>18 to coverage in place or reimbursement</p> <p>19 agreements, are you equating those two?</p> <p>20 A. I am.</p> <p>21 Q. And you do understand that</p> <p>22 the coverage in place or reimbursement</p> <p>23 agreements are a source of payment to the</p> <p>24 Trust for future claims?</p> <p>PP Obj: R; BE</p> <p>PP Obj: R; BE</p>	<p>Trav.</p> <p>Page 101</p> <p>1 companies are going to have to talk about</p> <p>2 the rights of the insurance companies</p> <p>3 versus the administration of the Trust.</p> <p>4 If there is litigation as between those</p> <p>5 parties, it is always the futures</p> <p>6 claimants who ends up paying for it,</p> <p>7 because there is sufficient money for the</p> <p>8 presents.</p> <p>9 So although I have no</p> <p>10 consent rights pursuant to the Trust</p> <p>11 Agreement, which is purely consultation,</p> <p>12 I would like to see less money spent on</p> <p>13 litigation and more on settlement for any</p> <p>14 disputes that arise.</p> <p>15 Q. In your general</p> <p>16 understanding of reimbursement</p> <p>17 agreements, do you have an understanding</p> <p>18 of the obligations that remain on the</p> <p>19 part of Grace in this particular case?</p> <p>20 A. Beyond cooperation?</p> <p>21 Q. Just generally, what is your</p> <p>22 understanding of the obligations that</p> <p>23 Grace has under the reimbursement</p> <p>24 agreements?</p> <p>PP Obj: R; S</p> <p>PP Obj: R; BE</p>

<p>Trav.</p> <p>Page 102</p> <p>1 A. Well, they may have audit 2 rights. They may have -- the insurance 3 company may have the right to audit claim 4 payments or even the handling of the 5 claims, and that's going to have to be 6 worked out. 7 Q. Do you have an understanding 8 that at least some of the reimbursement 9 agreements provide for Grace to allocate 10 claims in a certain way before they 11 charge the insurers for amounts that were 12 paid for claims? 13 A. I am not familiar with that. 14 Q. You are not familiar at all 15 with allocation? 16 A. I am familiar with 17 allocation by a trust. I am not familiar 18 with allocation by an insurance company 19 pursuant to an agreement. 20 Q. Can you turn to the 21 Cooperation Agreement, Austern-6. 22 A. Yes. 23 Q. And if you turn to page 3 of 24 Exhibit-6, you will see in Romanette 4,</p> <p>PP Obj: R; BE</p> <p>Trav.</p>	<p>Page 104</p> <p>1 MR. LIESEMER: Objection to 2 form. 3 MR. GUY: Objection, 4 hypothetical. 5 THE WITNESS: I don't know. 6 BY MS. ALCABES: 7 Q. Does the Plan say anywhere 8 whether or not the Trust will be 9 obligated to perform obligations under 10 the reimbursement agreements? 11 A. I don't believe the Plan 12 does. 13 Q. You believe the Plan is 14 silent on whether or not the Trust will 15 have to perform obligations under the 16 reimbursement agreements? 17 A. As I sit here, I can't think 18 of any provision that covers that. 19 Q. Can you turn to the Plan, 20 which has been marked as Austern-3, and 21 turn to page 63. 22 A. (Witness complies with 23 request.) 24 Q. Can you just read to</p> <p>PP Obj: R; BE</p>
<p>Trav.</p> <p>Page 103</p> <p>1 it says that "Grace has already provided 2 documents describing Grace's allocation 3 program and coverage-in-place agreement 4 policy registers for all settled 5 carriers." 6 Do you see that? 7 A. I see that. 8 Q. Do you have any 9 understanding of what all that refers to? 10 A. They have not provided it to 11 me. 12 Q. They have not provided it to 13 you? 14 A. No. 15 Q. Is that something that you 16 would typically want to look at? 17 A. I assume that my counsel 18 would want to look at it because I am not 19 sure I would understand it. 20 Q. If Grace has an obligation 21 to allocate claims in a certain way under 22 a reimbursement agreement, is it your 23 understanding that the Trust will comply 24 with those obligations going forward?</p> <p>PP Obj: R; BE</p> <p>Trav.</p>	<p>Page 105</p> <p>1 yourself at 7.2.2(d)(iv), which appears 2 on page 63? It starts, "On the Effective 3 Date, the Asbestos PI Trust shall be the 4 successor..."? 5 A. Yes. 6 Q. Okay. Do you understand 7 what this provision means? 8 A. I believe so. 9 Q. Can you explain to me what 10 you understand it to mean? 11 A. When the Personal Injury 12 Trust settles and pays a claim pursuant 13 the Trust Distrubution Process, it 14 constitutes a payment by Grace. 15 Q. Do you see the words "in 16 full compliance with each Asbestos 17 Insurance Reimbursement Agreement"? 18 A. Yes. 19 Q. Do you know what those words 20 mean? 21 MR. GUY: Objection. 22 Trav. THE WITNESS: Well, I know 23 what I think they mean. 24 BY MS. ALCABES:</p> <p>PP Obj: R; BE</p>

Trav.

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1 Q. What do you think they mean?
 2 A. I think they mean that the
 3 terms of the Asbestos Insurance
 4 Reimbursement Agreement has been complied
 5 with.

PP
Obj:
R; BE

6 Q. Is it your view that the
 7 Trust's payment of a claim is sufficient
 8 to trigger obligations under
 9 reimbursement agreements?

Trav.

10 MR. GUY: Objection.

11 THE WITNESS: I think that's
 12 going to have to be either
 13 litigated or settled in the
 14 future.

PP
Obj:
R; BE

15 BY MS. ALCABES:

16 Q. Aside from the Trust
 17 demonstrating that it made payments to
 18 claimants, is there anything else in your
 19 view that the Trust would have to
 20 demonstrate to a reimbursement agreement
 21 insurer in order to recover
 22 reimbursements under that agreement?

23 A. If it wants to get paid, it
 24 may have to.

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1 Q. Sitting here today, can you
 2 think of anything else that they might
 3 have to show?

4 A. If the insurance company
 5 says we are not going to pay, I think
 6 that's going to have to be worked out.

Trav.

7 Q. Do you know how the Trust
 8 will calculate an insurer's payment
 9 obligation under a reimbursement
 10 agreement?

PP
Obj:
R; BE

11 MR. LIESEMER: Objection to
 12 form.

Trav.

13 THE WITNESS: I am sorry.
 14 Calculate the insurance company's
 15 amount of payment?

16 MS. ALCABES: Yes.

17 THE WITNESS: No.

18 BY MS. ALCABES:

19 Q. You are aware that the Trust
 20 will be paying claims subject to a
 21 payment percentage?

22 A. Yes.

23 Q. And when the Trust pays
 24 claims subject to a payment percentage,

PP
Obj:
R; BE

Trav.

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1 there is some amount before they apply
 2 the payment percentage and some amount
 3 after they apply the payment percentage,
 4 correct?

5 A. I am not sure what amount is
 6 after the payment percentage.

7 Q. That's the amount that they
 8 actually pay. The Trust looks at a
 9 scheduled amount, applies a payment
 10 percentage, and then pays, correct?

11 A. Pays, yes.

12 Q. So you have got two amounts
 13 there?

14 A. Excuse me. Yes, I
 15 understand.

16 Q. Do you understand which
 17 amount will be tendered to a
 18 reimbursement agreement insurer for
 19 payment?

20 A. I do not.

21 Q. Does it say anywhere in the
 22 Plan to your knowledge whether the
 23 reimbursement agreement insurer will be
 24 charged for the scheduled amount or the

PP
Obj:
R; BE

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1 scheduled amount multiplied by the
 2 payment percentage?

3 A. I do not know of any such
 4 provision.

5 Q. Can you turn to Section
 6 7.15?

7 A. (Witness complies with
 8 request.)

9 Q. And look at 7.15(j). In
 10 your copy it may look like a Romanette 2.
 11 It follows (i).

12 A. The last section?

13 Q. Yes.

14 A. Yes.

15 Q. Now, I believe you said you
 16 didn't understand 7.15; is that correct?

17 MR. GUY: Objection.

18 THE WITNESS: I simply don't
 19 understand all of it.

20 BY MS. ALCABES:

21 Q. Do you understand the
 22 provision that you just read, 7.15(j)?

23 A. Assuming I understood
 24 7.2.2(d)(iv).

PP
Obj:
R; BE

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1 Q. What do you understand this
2 provision to mean?

3 A. Are you referring to --

4 Q. 7.15(j).

5 A. Well, the insurance
6 companies are bound by what 7.2.2(d)(iv)
7 gives them.

Trav.

8 Q. Do you have an understanding
9 as to whether reimbursement agreements
10 are subject to the insurance neutrality
11 provisions of 7.15?

PP
Obj;
R;
BE

Trav.

12 MR. GUY: Objection, vague.

13 THE WITNESS: I don't know.

14 BY MS. ALCABES:

15 Q. I am just going to show you
16 a portion of Mr. Lockwood's testimony and
17 ask if you just agree or disagree with
18 it.

PP
Obj;
R;
No
question
asked

19 A. Okay.

20 Q. I am directing you to
21 Mr. Lockwood's transcript, page 320, line
22 18 through 22.

23 A. I am sorry. Did you say
24 320?

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1 Q. Yes. Line 18 through 22.

2 A. That's the question.

3 Q. May I read it out loud?

4 A. Yes.

5 Q. It reads:

6 "You agree that the
7 reimbursement agreements are not
8 subject to the insurance
9 neutrality provisions, correct?

10 "Answer: Correct."

11 Do you agree or disagree
12 with him?

13 A. I don't know that I have a
14 view at all.

15 Q. Okay. Is there something
16 else that you would need to look at to
17 develop a view?

18 A. Well, what I would have to
19 look at would be post-confirmation, and
20 that is to how this was working out,
21 whether the insurance companies were
22 objecting to making payments on the
23 grounds that the insurance reimbursement
24 agreements were being violated and how

Trav.

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1 the trustees got money or didn't get
2 money.

3 Q. Do you expect to take a view
4 on whether the insurance neutrality
5 provisions apply to reimbursement
6 agreements at the confirmation hearing?

7 A. Me?

8 MR. GUY: Objection.

9 THE WITNESS: Me personally?

10 BY MS. ALCABES:

11 Q. Yes.

12 A. Not that I know of.

13 Q. Is it your view that the
14 insurance neutrality provisions will have
15 no -- strike that.

16 Post-confirmation, is it
17 your view that the insurance neutrality
18 provisions will or will not impact your
19 constituency being the Future Claims?

20 MR. LIESEMER: Objection to
21 form.

22 THE WITNESS: To the
23 assistant that the insurance
24 companies refuse to pay and the

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1 proceeds are for my clients, yes,
2 it could.

3 BY MS. ALCABES:

4 Q. Sitting here today, do you
5 know how you anticipate dealing with that
6 kind of situation?

7 MS. BAER: Objection.

8 THE WITNESS: The trustees
9 will have to deal with it.

10 BY MS. ALCABES:

11 Q. I believe you said when
12 Michael Brown was asking you some
13 questions that you are generally familiar
14 with contractual indemnity provisions in
15 agreements with insurers?

16 A. I know something about them.

17 Q. Can you just remind me what
18 you know about them?

19 A. I understand that there are
20 various types of indemnity agreements.
21 Sometimes an insured has to indemnify an
22 insurance company under certain
23 circumstances. So do third parties.

24 I am also aware,

PP
Obj;
R;
Vague

<p>Trav.</p> <p>Page 114</p> <p>1 unfortunately, because of the Manville</p> <p>2 Trust, aware of the fact that indemnity</p> <p>3 litigation in most states requires a</p> <p>4 perfectly innocent joint tortfeasor or a</p> <p>5 perfectly innocent party. Beyond that, I</p> <p>6 would have to look at the terms of an</p> <p>7 agreement.</p> <p>8 Q. Do you have an understanding</p> <p>9 of how the Plan treats indemnity claims</p> <p>10 by insurers under reimbursement</p> <p>11 agreements?</p> <p>12 A. I would have to rely on the</p> <p>13 advice of insurance counsel on that.</p> <p>14 Q. What about claims for</p> <p>15 indemnity under what I will call the</p> <p>16 fully settled agreements, which are in</p> <p>17 Schedule 2 to the Transfer Agreement?</p> <p>18 A. I would have the same</p> <p>19 answer.</p> <p>20 Q. So you just don't know?</p> <p>21 A. I just don't know.</p> <p>22 Q. Can you turn to the TDPs,</p> <p>23 which are Austern-5?</p> <p>24 A. Yes.</p> <p>PP Obj: R; vague</p> <p>PP Obj: R; BE</p> <p>LPO</p>	<p>Trav.</p> <p>Page 116</p> <p>1 A. Yes.</p> <p>2 Q. Do you understand that</p> <p>3 provision?</p> <p>4 A. I have a general</p> <p>5 understanding of it.</p> <p>6 Q. And is it your understanding</p> <p>7 that indemnification claims arising under</p> <p>8 fully settled settlement agreements would</p> <p>9 be subject to that provision?</p> <p>10 A. Yes.</p> <p>11 Q. Are you aware of the</p> <p>12 distinction between executory and</p> <p>13 non-executory contracts in the bankruptcy</p> <p>14 context?</p> <p>15 A. I thought executory</p> <p>16 contracts were signed contracts, but, no,</p> <p>17 I am not.</p> <p>18 Q. Are you aware of whether the</p> <p>19 Plan modifies any reimbursement</p> <p>20 agreements?</p> <p>21 MR. GUY: Objection, calls</p> <p>22 for a legal conclusion.</p> <p>23 THE WITNESS: I don't know.</p> <p>24 BY MS. ALCABES:</p> <p>PP Obj: R; BE</p>
<p>Page 115</p> <p>1 Q. And Section 5.6 which starts</p> <p>2 on page 35.</p> <p>3 A. Yes.</p> <p>4 Q. Do you have a general</p> <p>5 understanding of what indirect PI Trust</p> <p>6 claims are?</p> <p>7 A. A general understanding.</p> <p>8 Q. What's your understanding</p> <p>9 general understanding?</p> <p>10 MR. GUY: Objection, asked</p> <p>11 and answered.</p> <p>12 MS. ALCABES: I am sorry if</p> <p>13 you went into it before. Did you</p> <p>14 go into in detail?</p> <p>15 MR. BROWN: Yes.</p> <p>16 BY MS. ALCABES:</p> <p>17 Q. Do you have any</p> <p>18 understanding of whether or not indemnity</p> <p>19 claims under reimbursement agreements</p> <p>20 would be subject to 5.6?</p> <p>21 A. I believe they would be.</p> <p>22 Q. And if you turn to Section</p> <p>23 5.13 on page 49, Indemnified Insurer TDP</p> <p>24 Claims?</p> <p>PP Obj: R; BE</p> <p>PP Obj: R; BE</p> <p>LPO</p> <p>Trav.</p>	<p>Page 117</p> <p>1 Q. Are you aware of whether the</p> <p>2 Plan modifies the terms or provisions of</p> <p>3 any fully settled settlement agreements?</p> <p>4 MR. GUY: Same objection.</p> <p>5 THE WITNESS: I don't know.</p> <p>6 BY MS. ALCABES:</p> <p>7 Q. And, again, is it your</p> <p>8 position that if a dispute arose as to</p> <p>9 whether the Plan modifies obligations</p> <p>10 under either one of those settlement</p> <p>11 agreements, that your role would not</p> <p>12 arise until post-confirmation?</p> <p>13 A. That's correct.</p> <p>14 Q. And your role would be to</p> <p>15 participate in whatever way the trustee</p> <p>16 asks you to participate in the resolution</p> <p>17 of those claims?</p> <p>18 A. Subject to my inserting</p> <p>19 myself into it, yes.</p> <p>20 Q. Do you have any intention of</p> <p>21 reviewing any reimbursement agreements</p> <p>22 prior to the confirmation hearing?</p> <p>23 A. Not unless insurance counsel</p> <p>24 suggests I do so.</p>

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1 MS. ALCABES: Can you give
2 me two minutes? I may be
3 finished.
4 (There was a break from
5 12:24 p.m. to 12:25 p.m.)
6 BY MS. ALCABES:
7 Q. I just have one more
8 question, and it relates to the
9 Disclosure Statement, which I don't know
10 if I have a copy to mark as an exhibit.
11 But I just want to read you one passage
12 from Section 7.2.2(d)(iv).
13 MR. GUY: I have one if you
14 want to mark it.
15 MS. ALCABES: Thank you.
16 Let's mark this as Austern-8.
17 (Austern-8 marked for
18 identification at this time.)
19 BY MS. ALCABES:
20 Q. In my copy, it appears on
21 page 105. Actually, I quoted it wrong.
22 It's 4.7.2.2, Funding of the Asbestos PI
23 Trust.
24 A. 4.7.2?

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1 Q. 4.7.2.2, and I am going to
2 direct you to the paragraph just before
3 4.7.2.3, the paragraph that starts,
4 "Section 7.2.2(d)(iv) of the Plan..."
5 Do you see that? Have you
6 found it?
7 A. No.
8 MR. GUY: It's on the bottom
9 of --
10 THE WITNESS: Okay. I am
11 sorry.
12 BY MS. ALCABES:
13 Q. If you go towards the latter
14 part of the paragraph, there is a
15 sentence that starts, "As a result, the
16 Plan Proponents believe that, without
17 Section 7.2.2(d)(iv), the Asbestos PI
18 Trust may not be able to fulfill the
19 literal terms of certain reimbursement
20 conditions in the Asbestos Insurance
21 Reimbursement Agreements..."
22 And I would just ask you to
23 refer to the literal terms of certain
24 reimbursement conditions and ask you if

Trav.

Page 120

1 you know what that is referring to.
2 A. I hesitate because I spent
3 some time studying 7.2.2(d)(iv) or
4 whatever this is, which is not here. It
5 might help me if I could look at that.
6 Q. 7.25.2(d)(iv)?
7 A. Yes.
8 Q. It's in the Plan, which is
9 the section we were just looking at
10 before on page --
11 A. Wait a minute. I have not
12 found the Plan. Yes. I am sorry.
13 Q. It's on page 63 of the Plan.
14 A. Okay. I am sorry. What was
15 the question?
16 Q. What does the reference to
17 the literal terms of certain
18 reimbursement conditions in the
19 Disclosure Statement passage that I read
20 to you mean?
21 A. Well, to the extent I
22 understand this -- and I am not positive
23 this is responsive to your question --
24 pursuant to some of the reimbursement

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1 agreements, an insurance company would be
2 required to pay Grace money if Grace had
3 paid a claim following judgment of the
4 tort system or by way of settlement.
5 And what this is, I believe,
6 saying is that that the insurer now has
7 to pay Personal Injury Trust when the
8 Personal Injury Trust pays a claim.
9 Q. But, again, it doesn't speak
10 to any other obligations that may exist
11 under the reimbursement agreement on the
12 part of Grace before it can demand
13 payment from an insurer?
14 MR. LIESEMER: Objection to
15 form.
16 MS. BAER: Objection.
17 THE WITNESS: The document
18 does not, that's correct.
19 BY MS. ALCABES:
20 Q. So, for example, it does not
21 address whether or not the Trust will
22 have to allocate payments or provide
23 reporting to the insurers or allow audits
24 to be taking place, correct?

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Page 124

Trav.

1 MR. LIESEMER: Objection to
2 form.

3 MS. BAER: Same.

4 THE WITNESS: The document
5 does not say that.

6 BY MS. ALCABES:

7 Q. And the Plan does not say
8 that?

9 A. And the Plan does not say
10 that.

11 Q. And does the fact that the
12 Plan doesn't address the obligations --
13 strike that.

14 Does the fact that the Plan
15 doesn't address how the Trust will
16 perform obligations under a reimbursement
17 agreement impact your view as to whether
18 the Plan is fair as to the future
19 claimants?

20 MR. GUY: Objection, lacks
21 foundation.

Trav.

22 THE WITNESS: It does not
23 impact it.

24 BY MS. ALCABES:

PP
Obj:
R;
BE

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Page 125

Trav.

1 Q. Why not?

2 A. Because I believe the
3 insurance money is going to come to the
4 Trust, and I am only interested in the
5 money.

6 MS. ALCABES: I will pass
7 the witness. Thank you.

8 - - -

9 (There was a luncheon recess
10 from 12:31 p.m. to 1:05 p.m.)

11 - - -

12 AFTERNOON SESSION

13 - - -

14 EXAMINATION

15 - - -

16 BY MR. CANDON:

17 Q. Good afternoon, Mr. Austern.
18 My name is Chris Candon. I am from the
19 law firm Cohn Whitesell & Goldberg,
20 representing the Libby claimants. By
21 Libby claimants, it is terminology that
22 clients of our firm that are based in
23 Libby and expressed to asbestos exposure
24 in Lincoln County, Montana. I probably

PP
Obj:
R;
BE

1 need to speak up a little bit so everyone
2 can hear me.

3 MR. CANDON: I would like to
4 mark this as Exhibit-9.

5 (Austern-9 marked for
6 identification at this time.)

7 BY MR. CANDON:

8 Q. It's the Notice of
9 Deposition. Do you recall having
10 received or have seen that?

11 A. Yes.

12 Q. I will start with another
13 exhibit here.

14 MR. CANDON: Austern-10.

15 (Austern-10 marked for
16 identification at this time.)

17 BY MR. CANDON:

18 Q. Can you tell me what that
19 is?

20 MR. GUY: Do you have
21 another copy?

22 MR. CANDON: No, I don't.

23 This was an exhibit in

24 Mr. Lockwood's deposition.

1 BY MR. CANDON:

2 Q. If you focus on pages 8, 9,
3 10.

4 MS. BAER: What is it?

5 MR. CANDON: It's the 8-K
6 and the Term Sheet.

7 MS. BAER: And that's
8 Exhibit-10?

9 MR. CANDON: Yes.

10 BY MR. CANDON:

11 Q. Do you recall having
12 participated in negotiations of this Term
13 Sheet?

14 A. I participated in
15 negotiations of the Term Sheet. It was
16 in a somewhat different form than an 8-K,
17 but yes.

18 Q. Other than the terms that
19 are embodied on the Term Sheet, were you
20 aware of any other agreements made with
21 respect to Plan proponents and going
22 forward?

23 MR. GUY: Objection, vague.

24 MS. BAER: Objection to

<p style="text-align: right;">Page 150</p> <p>1 award.</p> <p>2 Q. For my own edification, does</p> <p>3 that occur at the same time? Can you be</p> <p>4 in individual review and extraordinary</p> <p>5 claims?</p> <p>6 A. No.</p> <p>7 Q. It's a multiple-step</p> <p>8 process?</p> <p>9 A. Yes.</p> <p>10 Q. And for purposes of time,</p> <p>11 can you estimate a time frame for</p> <p>12 claiming individual review and getting an</p> <p>13 offer from the Trust?</p> <p>14 MS. BAER: Objection,</p> <p>15 speculation. It also doesn't</p> <p>16 exist.</p> <p>17 THE WITNESS: No. But I</p> <p>18 will tell you it will be faster in</p> <p>19 the second year than it is in the</p> <p>20 start-up year.</p> <p>21 BY MR. CANDON:</p> <p>22 Q. Given that this case has</p> <p>23 gone on for eight years, does that have</p> <p>24 any other impact on the Trust, the first</p>	<p style="text-align: right;">Page 152</p> <p>1 for a second. In most trusts,</p> <p>2 arbitration is on the papers. It's not</p> <p>3 an appearance, if you will, process,</p> <p>4 although. And the arbitration procedures</p> <p>5 for this Plan have not been written. But</p> <p>6 traditionally, the only opportunity, if</p> <p>7 the arbitrator agrees, is by telephone</p> <p>8 conference call. So representation with</p> <p>9 a small R. It's not a formal appearance</p> <p>10 or hearing.</p> <p>11 In which case, it depends on</p> <p>12 the trust. In the case of Manville</p> <p>13 Trust, someone at the general counsel's</p> <p>14 office; the Eagle-Picher Trust has a</p> <p>15 lawyer who does it in-house. And I am</p> <p>16 not sure what the other trusts are doing.</p> <p>17 Q. And, again, the claimant</p> <p>18 cannot exceed the maximum value or cannot</p> <p>19 be offered more than the maximum value of</p> <p>20 the TDP?</p> <p>21 A. That's correct.</p> <p>22 Q. So the maximum value still</p> <p>23 is the ruling number on whether or not</p> <p>24 the outcome of arbitration?</p>
<p style="text-align: right;">Page 151</p> <p>1 one to two years?</p> <p>2 MR. GUY: Objection, vague.</p> <p>3 MS. BAER: Same objection.</p> <p>4 THE WITNESS: The answer is</p> <p>5 I don't know, but I assure you it</p> <p>6 will be addressed because it has</p> <p>7 gone on so long.</p> <p>8 BY MR. CANDON:</p> <p>9 Q. It's a significant back load</p> <p>10 of claims? Backlog, I should say.</p> <p>11 A. Well, that is almost always</p> <p>12 true, but beyond that, it has gone on a</p> <p>13 long time.</p> <p>14 Q. If a claimant is not</p> <p>15 satisfied with the individual review</p> <p>16 offer, what's the next step?</p> <p>17 A. Arbitration.</p> <p>18 Q. And I think the TDP offers</p> <p>19 two, either binding or nonbinding</p> <p>20 arbitration?</p> <p>21 A. That's correct.</p> <p>22 Q. Who actually represents the</p> <p>23 Trust in the arbitration proceeding?</p> <p>24 A. Ordinarily -- let me stop</p>	<p style="text-align: right;">Page 153</p> <p>1 A. Yes, but there are</p> <p>2 arbitrators who have written opinions</p> <p>3 suggesting that is an extraordinary</p> <p>4 claim.</p> <p>5 Q. So if we go through the</p> <p>6 arbitration process and the claimant</p> <p>7 agrees to the figure, do they have the</p> <p>8 ability to then take that claim to</p> <p>9 extraordinary --</p> <p>10 A. If they choose binding</p> <p>11 arbitration, it's binding arbitration.</p> <p>12 Q. Suppose they go through</p> <p>13 nonbinding arbitration and still no</p> <p>14 agreement is reached. What's the next</p> <p>15 step?</p> <p>16 A. Exit to the tort system.</p> <p>17 Q. In your experience, how</p> <p>18 frequently does that happen?</p> <p>19 A. Well, the Manville Trust has</p> <p>20 a little over 800,000 claims, and it's</p> <p>21 happened once.</p> <p>22 Q. So infrequently?</p> <p>23 A. I would say infrequently.</p> <p>24 Q. Now, if the claimant is</p>

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1 Q. Right. You are not aware of
2 the numbers?

3 A. No.

4 Q. Is there any reason why a
5 recusal mechanism with respect to TAC
6 members in connection with the individual
7 review of claims could not be written
8 into the Grace TDPs?

9 A. I suppose it could be. I
10 think it would be redundant.

11 Q. Redundant how?

12 A. Well, the Model Rules of
13 Professional Conduct require that lawyers
14 recuse themselves where they have
15 conflicts.

16 Q. Is it your view that the
17 Grace Trust Agreement and/or TDPs would
18 incorporate those model rules in
19 connection with any potential conflicts?

20 A. I am not sure I know what
21 you mean by incorporate. But those rules
22 exist for all practicing lawyers who are
23 licensed to practice law.

24 Q. It's your view that the TAC

1 and I knew that this claim was
2 theirs, yes.

3 BY MR. DEMMY:

4 Q. Changing subjects a bit, you
5 understand that one of the provisions of
6 the Plan is -- and I think you have
7 looked at the Transfer Agreement
8 previously in the deposition.

9 One of the provisions of the
10 Plan is a proposed assignment of
11 insurance rights by Grace to the Trust,
12 correct?

13 A. Yes.

14 Q. Are you aware of any
15 requirement in the bankruptcy code or
16 otherwise that requires Grace to assign
17 insurance rights to the Trust in
18 connection with a Plan that incorporates
19 a Section 524(g) channelling injunction?

20 A. I am not a bankruptcy
21 lawyer, but I don't know of any
22 requirement.

23 Q. So that's a discretionary
24 activity by Grace or a discretionary

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Page 173

1 members will be bound by those rules in
2 connection with their activities with
3 regard to the Grace Trust?

4 A. That is a much better answer
5 than I gave and that's my answer.

6 Q. In the event -- let me start
7 over.

8 After the Grace Trust is
9 implemented, if it is, or is established,
10 I should say, if there is occasion in
11 which an individual claim becomes the
12 subject of a review and the TAC members
13 are involved in that, would you request
14 their recusal if the claim was one in
15 which a TAC member was the claimant's
16 counsel?

17 MR. GUY: Objection.

18 MR. LIESEMER: Objection to
19 form.

20 MR. GUY: Hypothetical,
21 speculation.

22 You may answer.

23 THE WITNESS: If that TAC
24 member did not recuse themselves

1 proposal by Grace as part of this Plan?

2 A. I am not sure I know what
3 you mean by discretionary, but I would
4 agree they have done that.

5 Q. Okay. Grace doesn't have to
6 propose a transfer of insurance rights to
7 the Trust as part of this Plan, correct?

8 MS. BAER: Objection to the
9 form.

10 THE WITNESS: To the extent
11 I understand the bankruptcy code,
12 that's true.

13 MR. DEMMY: I don't have any
14 other questions.

15 - - -

16 EXAMINATION

17 - - -

18 BY MR. COHN:

19 Q. Mr. Austern, you said that
20 in preparation for these depositions, you
21 reviewed the updated reports of Jenny
22 Biggs and Mr. Florence and Mr. Peterson;
23 is that right?

24 A. Yes.

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Page 184

1 MR. COHN: And the Lockwood
2 deposition, that as soon as I
3 start getting into substantive
4 issues about what happened in the
5 negotiation of the Plan of the
6 TDPs, I am going to face an
7 instruction not to answer on the
8 bases that Ms. Harding has set
9 forth previously?

10 MR. GUY: I didn't attend
11 Finke. I did attend Peter's. I
12 know that objection was raised,
13 but I also know that he got into a
14 lot of those issues. So we will
15 take it question by question.

16 MS. BAER: The Debtor will
17 object to any of those questions
18 being asked and answered.

19 MR. LIESEMER: So will the
20 ACC.

21 BY MR. COHN:

22 Q. Who besides the FCR and the
23 ACC was involved in the negotiation of
24 the TDPs, if anyone?

CPO

PP
Obj:
R, BE,
F

1 interest called sequencing; inflation
2 issues; and the scheduled values.

3 Q. You want to maximize the
4 recovery for your constituency, correct?

5 A. Yes.

6 Q. You want to maximize the
7 likelihood that money is going to be
8 available to pay your constituency,
9 correct?

10 A. That's correct.

11 Q. You want to at the same time
12 maximize the payment to all beneficiaries
13 within the confines of making sure there
14 is enough money around; is that right?

15 MR. GUY: Objection as to
16 beneficiaries.

17 THE WITNESS: Well --

18 MR. COHN: Let me take that
19 back.

20 BY MR. COHN:

21 Q. Do you understand
22 beneficiaries to be those people who are
23 entitled to receive money from the Trust?
24 A. Yes.

PP
Obj:
R

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1 A. I don't remember anybody
2 else.

3 Q. So, as far as you know, the
4 TDPs were drafted in consultation between
5 the FCR and the ACC alone; is that
6 correct?

7 MR. GUY: Objection.

8 THE WITNESS: Well,
9 recognizing that the ACC included
10 a Libby claimant, the answer is
11 yes.

12 BY MR. COHN:

13 Q. Okay. Is it fair to say
14 that -- strike that.

15 In constructing TDPs, what
16 are the major concerns of you, as the
17 FCR?

18 A. The payment percentage; the
19 maximum available payment; the maximum
20 payment meaning the year; whether there
21 is sequencing, which in plain English is
22 if you are not paid -- if you are awarded
23 a payment but not paid because of maximum
24 available payment percentages, you get

PP
Obj:
R, BE,
FPP
Obj:
R, BE,
FPP
Obj:
R

1 MR. GUY: Presents or
2 futures?

3 MR. COHN: Aren't the
4 futures and the presents all
5 beneficiaries of the contemplated
6 Trust?

7 MR. GUY: But your questions
8 have been asking about futures,
9 and the witness has been answering
10 as to futures. And now you are
11 bringing it back as to --

12 MR. COHN: I thought I was
13 talking holistically.

14 BY MR. COHN:

15 Q. Does your answer change for
16 the last couple of questions?

17 A. No. But I was going to say
18 the Plan -- the TDP and I believe the
19 Plan itself requires that all
20 beneficiaries be treated similarly. So
21 to the extent that I have to live with
22 that, the answer is yes.

23 Q. What is the FCR's view with
24 respect to the propriety of inflation,

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1 Q. How many meetings did you
2 personally attend in the course of
3 negotiating the TDPs?

4 MR. GUY: Meetings with who?

5 MS. BAER: Objection.

6 BY MR. COHN:

7 Q. I guess with the ACC would
8 be the other involved party that wasn't
9 your counsel.

10 A. I am sorry. Are you
11 eliminating this to negotiating the TDP?

12 Q. Yes.

13 A. I would have to guess.
14 Somewhere between eight and 12.

15 Q. Was there discussion of
16 whether or not to permit the insurers to
17 be involved in the processing of claims?

18 MR. LIESEMER: Objection.

19 MR. GUY: Objection.

20 You can answer -- well, you
21 know what? I will defer to these
22 guys.

23 MS. BAER: Can you read back
24 the question?

1 as counsel for the FCR,
2 Mr. Austern not to answer the
3 question because the other Plan
4 proponents are raising
5 confidentiality issues with regard
6 to settlement discussions, and I
7 am adhering to that request.

8 And as the Court has stated
9 many times, negotiations are not
10 relevant and, therefore, would not
11 be admissible at the Plan
12 confirmation hearing.

13 MR. COHN: We disagree.

14 MR. GUY: Understood.

15 MR. COHN: I think I tested
16 your tolerance to where I am going
17 to get instructions not to answer.
18 I think I will stand down now and
19 let Mr. Plevin question.

20 - - -

21 EXAMINATION

22 - - -

23 BY MR. PLEVIN:

24 Q. Good afternoon, Mr. Austern.

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1 (The reporter read from the
2 record as requested.)

3 MS. BAER: Objection.

4 MR. LIESEMER: Objection.

5 MR. GUY: But do you want
6 the witness to answer?

7 MS. BAER: To the extent the
8 witness would have to reveal
9 discussions about negotiations of
10 the various Plan documents, I
11 would object.

12 If you can answer without
13 revealing that kind of
14 information, then I won't object.

15 THE WITNESS: I don't think
16 I can.

17 MR. COHN: So you are
18 instructing?

19 MR. GUY: Yes.

20 MR. DEMMY: Can I ask a
21 clarifying question? Who is
22 instructing the witness not to
23 answer?

24 MR. GUY: I am instructing,

1 A. Good afternoon.

2 Q. Just so we are straight, I
3 represent Fireman's Fund Insurance
4 Company in this case only with respect to
5 issues concerning Fireman's Fund's proof
6 of claim and the indemnity agreement
7 between Fireman's Fund and Grace and the
8 supersedeas bond that Fireman's Fund
9 posted with respect to a case in Texas
10 that I want to ask you some questions
11 about.

12 Let me start, first of all,
13 by asking if you are generally familiar
14 with the Edwards case in Texas?

15 A. Yes.

16 Q. Can you tell me what you
17 know about that case in general?

18 A. Mr. Reaud, R-E-A-U-D, I
19 think --

20 Q. Correct spelling. I don't
21 know if the pronunciation is right.

22 A. -- has a judgment on appeal
23 in an asbestos personal injury claim
24 against Grace in a number of millions of

<p>FFIL SC</p> <p>Page 194</p> <p>1 dollars. I think that's what I know --</p> <p>2 which was stayed, of course, because of</p> <p>3 the bankruptcy.</p> <p>4 Q. And in which the appeal was</p> <p>5 stayed?</p> <p>6 A. The appeal was stayed.</p> <p>7 Q. And I will represent to you</p> <p>8 that there were five plaintiffs who are</p> <p>9 part of that judgment.</p> <p>10 But your understanding then</p> <p>11 is that there was a judgment in the trial</p> <p>12 court, correct?</p> <p>13 A. Correct.</p> <p>14 Q. Which was appealed?</p> <p>15 A. Correct.</p> <p>16 Q. And that the appellate</p> <p>17 proceedings were stayed by the Grace</p> <p>18 bankruptcy?</p> <p>19 A. Correct.</p> <p>20 Q. Do you know that as part of</p> <p>21 the appellate proceedings, Fireman's Fund</p> <p>22 posted a supersedeas bond to enable Grace</p> <p>23 to go forward on the appeal without</p> <p>24 Grace's assets being immediately at risk</p> <p>PP Obj: R; BE</p>	<p>Page 196</p> <p>1 MS. BAER: Objection. It</p> <p>2 also seeks attorney-client</p> <p>3 communication.</p> <p>4 MR. LIESEMER: Same</p> <p>5 objection.</p> <p>6 MR. GUY: To the extent you</p> <p>7 can answer without revealing</p> <p>8 communications with your</p> <p>9 counsel --</p> <p>10 MR. PLEVIN: Let me just be</p> <p>11 certain that I did not ask him for</p> <p>12 any communications. I didn't ask</p> <p>13 him what anybody told him or what</p> <p>14 he said to anybody. I asked him</p> <p>15 if he has a view.</p> <p>16 He is a party to the</p> <p>17 bankruptcy as the Future</p> <p>18 Claimants' Representative, and he</p> <p>19 either has a view or he doesn't.</p> <p>20 If he has a view, I intend to ask</p> <p>21 him what his view is and what the</p> <p>22 basis for it is.</p> <p>23 And if the point then is</p> <p>24 that he can only say it based on</p>
<p>Page 195</p> <p>1 for execution by the plaintiffs?</p> <p>2 A. I have been told that.</p> <p>3 Q. Do you understand that in</p> <p>4 connection with the issuance of the</p> <p>5 supersedeas bond, Fireman's Fund and</p> <p>6 Grace entered into an indemnity agreement</p> <p>7 pursuant to which Grace agreed to</p> <p>8 indemnify Fireman's Fund for any amounts</p> <p>9 that Fireman's Fund paid pursuant to the</p> <p>10 bond?</p> <p>11 A. I have been told that.</p> <p>12 Q. And do you know that</p> <p>13 Fireman's Fund has filed a proof of claim</p> <p>14 seeking to recover from Grace's estate</p> <p>15 any and all amounts that Fireman's Fund</p> <p>16 might be obligated to pay under the</p> <p>17 supersedeas bond?</p> <p>18 A. I have been told that.</p> <p>19 Q. Do you have a view as to the</p> <p>20 likelihood of success on Grace's appeal</p> <p>21 or the strength of Grace's position on</p> <p>22 appeal?</p> <p>23 MR. GUY: Objection, seeks a</p> <p>24 legal conclusion.</p>	<p>Page 197</p> <p>1 counsel, that would be the proper</p> <p>2 time to make that objection.</p> <p>3 MR. GUY: I actually don't</p> <p>4 think you can, because what you</p> <p>5 are trying to elicit is expert</p> <p>6 testimony from a lawyer about a</p> <p>7 merits of a case that's pending in</p> <p>8 court. And that testimony would</p> <p>9 be barred on a 701 F.R.E. I don't</p> <p>10 think you can ask that. It would</p> <p>11 not be admissible in the</p> <p>12 bankruptcy case.</p> <p>13 If you can explain to me how</p> <p>14 Mr. Austern's view about the</p> <p>15 merits of a legal case would be</p> <p>16 admissible before Judge</p> <p>17 Fitzgerald, I would be happy to</p> <p>18 hear it. Maybe you can try it</p> <p>19 another way.</p> <p>20 MR. PLEVIN: I am trying to</p> <p>21 think of what the other way would</p> <p>22 be.</p> <p>23 MR. GUY: There is no good</p> <p>24 way.</p>

Page 198	Page 200
<p>1 MR. PLEVIN: Let me</p> <p>2 reiterate my view that Mr. Austern</p> <p>3 is a party to the case, and -- all</p> <p>4 right. Let me see if I can get to</p> <p>5 the point of demonstrating the</p> <p>6 relevance in this fashion.</p> <p>7 MR. GUY: I will tell you</p> <p>8 what. If I could talk to my</p> <p>9 client for two seconds, I think we</p> <p>10 can cut through this.</p> <p>11 MR. PLEVIN: Sure.</p> <p>12 (There was a discussion held</p> <p>13 off the record at this time.)</p> <p>14 MR. GUY: You may answer the</p> <p>15 question as long as there is an</p> <p>16 express understanding that you are</p> <p>17 not going to argue that there is</p> <p>18 any kind of waiver of privilege in</p> <p>19 the answer.</p> <p>20 MR. PLEVIN: That's</p> <p>21 acceptable.</p> <p>22 THE WITNESS: I believe</p> <p>23 there is a question on the floor.</p> <p>24 BY MR. PLEVIN:</p>	<p>1 the proof of claim filed by Fireman's</p> <p>2 Fund that I described a moment ago?</p> <p>3 MS. BAER: Objection as to</p> <p>4 form.</p> <p>5 MR. GUY: Objection.</p> <p>6 You may answer.</p> <p>7 THE WITNESS: No.</p> <p>8 BY MR. PLEVIN:</p> <p>9 Q. Do you have an</p> <p>10 understanding, Mr. Austern, as to what</p> <p>11 the rights of the Edwards plaintiffs</p> <p>12 would be under the Plan in the TDPs in</p> <p>13 the event that the judgment that they</p> <p>14 currently hold were to be reversed by</p> <p>15 either the Texas Court of Appeals or the</p> <p>16 Texas Supreme Court?</p> <p>17 MS. BAER: Objection, form.</p> <p>18 MR. LIESEMER: Same</p> <p>19 objection.</p> <p>20 MR. PLEVIN: What was the</p> <p>21 objection?</p> <p>22 MS. BAER: Form.</p> <p>23 THE WITNESS: You are asking</p> <p>24 me, do I have a view of what they</p>
Page 199	Page 201
<p>1 Q. Yes. And I believe the</p> <p>2 question on the floor is whether you have</p> <p>3 an opinion as to the likelihood of</p> <p>4 success on appeal or the strength of</p> <p>5 Grace's position on appeal in the Edwards</p> <p>6 matter?</p> <p>7 A. No.</p> <p>8 MS. BAER: Objection to the</p> <p>9 extent you are requesting</p> <p>10 communications among the</p> <p>11 co-proponents and therefore the</p> <p>12 codefendants.</p> <p>13 MR. LIESEMER: And I join</p> <p>14 the objection.</p> <p>15 MR. PLEVIN: And I will</p> <p>16 reiterate that I was not asking</p> <p>17 him about any communications. I</p> <p>18 was asking him about his own view.</p> <p>19 BY MR. PLEVIN:</p> <p>20 Q. And your answer,</p> <p>21 Mr. Austern?</p> <p>22 A. I have no view.</p> <p>23 Q. Do you have a view as to the</p> <p>24 proper classification under the Plan of</p>	<p>1 would do?</p> <p>2 BY MR. PLEVIN:</p> <p>3 Q. What their rights would be</p> <p>4 under the Plan.</p> <p>5 A. I assume their rights would</p> <p>6 be to file a personal injury claim with</p> <p>7 the Trust.</p> <p>8 Q. As opposed to taking their</p> <p>9 case back to a trial court, if it were</p> <p>10 remanded for a new trial and retrying the</p> <p>11 case in the trial court?</p> <p>12 MS. BAER: Objection. Now</p> <p>13 you are asking for a legal</p> <p>14 conclusion.</p> <p>15 MR. LIESEMER: Objection,</p> <p>16 speculation, hypothetical.</p> <p>17 THE WITNESS: I don't know.</p> <p>18 My understanding of the Plan is</p> <p>19 they got to file a Personal Injury</p> <p>20 Trust claim.</p> <p>21 BY MR. PLEVIN:</p> <p>22 Q. If there is a reversal?</p> <p>23 A. Yes.</p> <p>24 Q. Do you understand,</p>

Page 202

1 Mr. Austern, the concept of set-off in
2 bankruptcy?

3 A. I understand set-off
4 generally as a proposition. I am not
5 sure I would apply it -- I don't know
6 that I know enough bankruptcy law to
7 apply it to bankruptcy.

8 Q. Okay. What is your
9 understanding of the concept of set-off?

10 A. Well, if I owe you \$10,000
11 and I have to pay Mr. Guy because you owe
12 him some money, I can set-off from what I
13 paid Mr. Guy what I owe you.

14 MR. PLEVIN: Can you read
15 that answer back?

16 (The reporter read from the
17 record as requested.)

FFIL
ScFFIL
Sc

18 BY MR. PLEVIN:

19 Q. Are you aware, Mr. Austern,
20 that Grace has made claims for insurance
21 coverage against Fireman's Fund under
22 liability insurance policies issued by
23 Fireman's Fund?

24 A. Yes.

PP
Obj:
R;
BE

Page 204

1 question without getting into a
2 legal analysis. He is here as a
3 fact witness.

4 But, again, let me talk to
5 my client, and I think we can
6 resolve it with the answer.

7 MS. BAER: We join in the
8 objection.

9 (There was a discussion held
10 off the record at this time.)

11 THE WITNESS: I have no
12 view.

13 BY MR. PLEVIN:

14 Q. Do you have a concern that
15 if the Edwards appeal were to be --
16 withdrawn.

17 Do you have a concern that
18 if the Edwards judgment were to be
19 affirmed on appeal and Fireman's Fund
20 paid money to Edwards and then made a
21 claim against Grace for the amount paid,
22 that that would in some way reduce the
23 amount of money coming into the Trust
24 from the Fireman's Fund insurance policy?

PP
Obj:
R;
S

FFIL Sc

Page 203

1 Q. And that the insurance
2 coverage claims Grace has made at least
3 include, if not -- they are not limited
4 to claims for coverage of asbestos
5 personal injury claims?

6 A. I am sorry. Can you say
7 that again?

8 Q. I got a little tied up
9 there.

10 Grace is seeking coverage
11 from Fireman's Fund under the Fireman's
12 Fund insurance coverage policies for
13 asbestos personal injury claims asserted
14 against Grace, correct?

15 A. Yes.

16 Q. Do you have a view as to
17 whether in the event that Fireman's Fund
18 is obligated to pay insurance coverage to
19 Grace, Fireman's Fund would be able to
20 reduce that obligation by any amount that
21 Grace is obligated to pay under the
22 indemnity agreement?

23 MR. GUY: Objection. I
24 don't see how he can answer that

PP
Obj:
R;
BELFO
FFIL
Sc

Page 205

1 MR. LIESEMER: Objection to
2 the form.

3 MS. BAER: Objection.

4 MR. GUY: Objection to form.

5 THE WITNESS: Mr. Plevin, I
6 have any concern that the activity
7 might reduce the amount of
8 insurance coming into the Grace
9 Trust. And I understand this is
10 approximately \$6 million. And if
11 Fireman's Fund were to reduce its
12 payment or be entitled to reduce
13 its payment under the Fireman's
14 Fund policy for asbestos personal
15 injury to the Trust and it would
16 reduce it by \$6 million, yes, I
17 have a concern.

18 BY MR. PLEVIN:

19 Q. And I am sure this has been
20 established on the record long before I
21 came here, but let me just ask this
22 question for foundational purposes.

23 You are an attorney,
24 Mr. Austern?

PP
Obj:
R;
SPP
Obj:
R

52 (Pages 202 to 205)

<p>LPO FFIC SL</p> <p>Page 206</p> <p>1 A. Yes.</p> <p>2 Q. And you have practiced law</p> <p>3 for how many years?</p> <p>4 A. 45.</p> <p>5 MR. PLEVIN: Thank you. I</p> <p>6 have no further questions.</p> <p>7 MR. CALOGERO: I have no</p> <p>8 questions.</p> <p>9 MR. WISLER: Maryland</p> <p>10 Casualty has no questions.</p> <p>11 MR. GUY: Are there any</p> <p>12 insurers on the phone who have</p> <p>13 questions?</p> <p>14 Scotts? BNSF? Do you have</p> <p>15 any questions?</p> <p>16 MS. COBB: Yes. This is</p> <p>17 Tiffany Cobb on behalf of The</p> <p>18 Scotts Company, LLC, with Vorys,</p> <p>19 Sater, Seymour and Pease. Can you</p> <p>20 hear me?</p> <p>21 MR. GUY: Yes. Hi, Tiffany.</p> <p>22 - - -</p> <p>23 EXAMINATION</p> <p>24 - - -</p> <p>PP Obj: R</p>	<p>Page 208</p> <p>1 who specifically do you view as your</p> <p>2 punitive clients?</p> <p>3 A. Future claimants.</p> <p>4 Q. Okay. And in your capacity</p> <p>5 as the FCR then, do you owe a fiduciary</p> <p>6 duty to asbestos PI claimants as defined</p> <p>7 in the Plan who hold future demands</p> <p>8 against any entity that is addressed in</p> <p>9 the definition of an asbestos PI</p> <p>10 claimant?</p> <p>11 A. Can you repeat the last part</p> <p>12 of that. Against whom?</p> <p>13 Q. Sure. Against any entity</p> <p>14 that is addressed in the definition of</p> <p>15 asbestos PI claimant?</p> <p>16 A. Yes.</p> <p>17 Q. In your capacity as the FCR,</p> <p>18 do you owe a fiduciary duty to indirect</p> <p>19 PI Trust claimants who hold future</p> <p>20 demands against the Debtors?</p> <p>21 A. Yes.</p> <p>22 Q. In your capacity as the FCR,</p> <p>23 do you owe a fiduciary duty to</p> <p>24 insurance-related claimants who hold</p>
<p>Page 207</p> <p>1 BY MS. COBB:</p> <p>2 Q. Mr. Austern, in your</p> <p>3 capacity as the Asbestos PI Future</p> <p>4 Claimants' Representative, what fiduciary</p> <p>5 duties do you owe?</p> <p>6 MR. GUY: Tiffany, we</p> <p>7 covered that earlier in the</p> <p>8 deposition. Were you listening</p> <p>9 in?</p> <p>10 MS. COBB: I was.</p> <p>11 MR. GUY: I just don't want</p> <p>12 to have a lot of duplicity in the</p> <p>13 questioning. I will allow this</p> <p>14 one.</p> <p>15 THE WITNESS: I have a</p> <p>16 fiduciary duty to future</p> <p>17 claimants.</p> <p>18 BY MS. COBB:</p> <p>19 Q. But what are the duties?</p> <p>20 A. Essentially to make sure</p> <p>21 there is sufficient funds, that when they</p> <p>22 file claims they will be treated the same</p> <p>23 or similarly to present claimants.</p> <p>24 Q. In your capacity as the FCR,</p>	<p>Page 209</p> <p>1 future demands against any settled</p> <p>2 insurance company?</p> <p>3 A. I think I would have to go</p> <p>4 back and look at the definition of those</p> <p>5 people.</p> <p>6 Q. Okay. Then let's do that.</p> <p>7 If you would, please, look at Exhibit-5</p> <p>8 which is the TDP, and if you would please</p> <p>9 look at Section 5.12.</p> <p>10 A. I am looking at it, but give</p> <p>11 me a moment.</p> <p>12 Q. Sure.</p> <p>13 A. Okay. What was the</p> <p>14 question?</p> <p>15 Q. In your capacity as the FCR,</p> <p>16 do you owe a fiduciary duty to</p> <p>17 insurance-related claimants who hold</p> <p>18 future demands against any settled</p> <p>19 insurance companies?</p> <p>20 A. I don't know. I would have</p> <p>21 to think about that. I realize they</p> <p>22 could be indirect claimants, at least I</p> <p>23 think they could be indirect claimants.</p> <p>24 So I would have to think about that. I</p>

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LPO

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1 Mr. Austern, but I would like to
2 read a statement into the record,
3 if that's okay.

4 As counsel for the
5 Creditors' Committee that Plan
6 proponents have previously
7 discussed and agreed the
8 Creditors' Committee may seek a
9 subsequent deposition of
10 Mr. Austern or any other person or
11 persons solely in connection with
12 Plan feasibility issues. Thank
13 you.

14 MR. GUY: Mr. Brown.

15 - - -

16 EXAMINATION

17 - - -

18 BY MR. BROWN:

19 Q. Mr. Austern, I have a few
20 follow-up questions mainly to what
21 Mr. Cohn questioned you about.

22 I think one of the documents
23 that the Libby claimants' counsel handed
24 you was an 8-K. I don't recall the name

1 were any of the Debtors' insurers
2 consulted about any term of this Term
3 Sheet prior to April 6, 2008?

4 A. Well, I didn't consult with
5 them, so I don't know. I did not consult
6 with them.

7 Q. Are you aware of anyone else
8 consulting with them?

9 A. No.

10 Q. To your knowledge, did any
11 of the Debtors' insurers consent to any
12 term in the Term Sheet prior to April 6,
13 2008?

14 A. Not that I know of.

15 Q. Now, the initial Joint Plan
16 was filed in September of 2008, correct?

17 A. Yes.

18 Q. Would I be correct in
19 assuming that between April 6, 2008 and
20 September 2008 that the Plan proponents
21 were working on the terms of the Plan and
22 Plan documents?

23 A. I was, and I know others
24 were.

PP
Obj:
R;
BE;
F

PP
Obj:
R;
BE

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LPO

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1 of it. Do you have it there?

2 A. I have it here. I have it.

3 Q. Okay. And attached to that
4 8-K there is a Term Sheet, correct?

5 A. Yes.

6 Q. And I believe your testimony
7 was earlier that you have seen this Term
8 Sheet but some other iteration of it; is
9 that correct?

10 A. Yes.

11 Q. Not in the form of an
12 attachment to an 8-K?

13 A. Oh, no. I meant I have seen
14 a printed version of this.

15 Q. Okay. But, in substance,
16 it's the same document as what is
17 attached to the 8-K?

18 A. Yes.

19 Q. Okay. You will agree with
20 me, will you not, that the Term Sheet is
21 dated April 6, 2008?

22 A. If you will tell me -- yes,
23 it is.

24 Q. Okay. To your knowledge,

1 Q. Okay. And would I also be
2 correct that in that time period the Plan
3 proponents and their counsel were
4 drafting Plan documents?

5 A. I know my counsel was.

6 Q. In that time frame, April 6,
7 2008 to September 2008, to your
8 knowledge, were any of the Debtors
9 insurers' consulted about any of the
10 terms in the Plan or Plan documents?

11 A. I do not know of any
12 consultations that took place.

13 Q. Okay. To your knowledge,
14 were any of the Debtors insurers'
15 consented about any term in the Plan or
16 Plan documents in that time frame?

17 A. Well, having not been
18 consulted, I would be surprised if they
19 consented, but I don't know if they
20 consented.

21 Q. All right. Now, in your
22 prior testimony, in answer to one of
23 Mr. Cohn's questions, you indicated that
24 you were aware of circumstances in which

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Obj:
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BE;
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Obj:
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BE;
F

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1 plaintiff's personal injury attorneys had
2 waived their fees?

3 A. Yes.

4 Q. Putting those circumstances
5 aside, do you have an understanding as to
6 what the customary contingency fee
7 arrangement is for plaintiffs' asbestos
8 personal injury lawyers?

9 MR. LIESEMER: Objection to
10 the form. No foundation.

11 THE WITNESS: I know what it
12 is in the Manville Trust because
13 the Manville Trust dictates what
14 it will be.

15 BY MR. BROWN:

16 Q. Okay.

17 A. Putting that aside, I think
18 it depends on the case. I am familiar
19 with the fact, for instance, that medical
20 malpractice attorneys charge a somewhat
21 higher contingency fee than others do. I
22 am not sure I know what the standard fee
23 is for asbestos personal injury.

24 Q. Do you have any idea what

1 Plan?

2 A. Not that I know of.

3 Q. Why?

4 A. I don't know.

5 Q. Are you aware of other
6 asbestos trusts where there is a cap with
7 respect to contingency fees that can be
8 paid to plaintiffs lawyers?

9 A. You did say asbestos trusts?

10 Q. Yes.

11 A. I do not know of any other
12 asbestos trust that has a cap.

13 Q. Focusing for a moment on the
14 CE Trust, are the TAC members paid for
15 their services as TAC members?

16 A. You know, I don't remember.
17 I know there is a provision to pay their
18 expenses. I can't remember if they are
19 paid. I just know I am paid.

20 Q. Well, that's important.

21 How about with respect to
22 this Trust in the Grace bankruptcy? Do
23 you know whether the TAC members will be
24 paid in any fashion for their services

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Page 249

1 Mr. Cooney's firm charges by way of
2 contingency fee?

3 A. No.

4 Q. Mr. Weitz?

5 A. No.

6 Q. Mr. Rice?

7 A. No.

8 Q. Mr. Budd?

9 A. No.

10 Q. Anyone?

11 A. No.

12 Q. You mentioned that there is
13 a cap -- I am not sure you used the term
14 "cap" -- there is a fee in the Manville
15 Trust Agreement?

16 A. Yes.

17 Q. Is it a cap?

18 A. No -- it is a cap. It says
19 the fee cannot exceed 5 percent.

20 Q. Okay. How did that term
21 come about in the Manville Trust?

22 A. In words of one syllable,
23 Judge Weinstein insisted on it.

24 Q. Is there a cap under this

1 TAC members?

2 A. Do you mean other than
3 expenses?

4 Q. Yes.

5 A. And I don't recall any
6 specific provision.

7 Q. Okay. I found it.

8 A. Which page?

9 Q. Page 32.

10 A. Are we in the Plan?

11 Q. No. We are in the Trust
12 Agreement, page 32 of the Trust
13 Agreement.

14 A. I am sorry. Just a minute.
15 What page?

16 Q. 32, Section 5.6.

17 A. I seem to have an agreement
18 that's out of pagination. Just a moment.

19 Yes. 5.6, yes, they are
20 paid -- I stand corrected -- an hourly
21 rate.

22 Q. All right. Do you have any
23 understanding today as to what the hourly
24 rate will be for the members of the TAC

CPO

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1 if the Plan is confirmed?
 2 A. No, I don't.
 3 Q. Do you have any view as to
 4 what the hourly rate would be if the Plan
 5 is confirmed?
 6 A. I confess, Mr. Brown, having
 7 forgotten that they are entitled to an
 8 hourly rate, I would have to think about
 9 that. But I, at this point, have no
 10 view.
 11 Q. Okay. Do you have a view as
 12 to whether they should be paid that
 13 hourly rate above and beyond whatever
 14 fees they get from their individual
 15 clients who recover from the Trust?
 16 A. If Section 5.6 gives them
 17 the right to get the hourly rate, I think
 18 they should get the hourly rate.
 19 MR. BROWN: I think that's
 20 all. Thank you, Mr. Austern.
 21 MR. CANDON: I have one
 22 follow-up question.
 23 MR. GUY: Sure. Go ahead.
 24 - - -

PP
Obj:
R;
BE

CERTIFICATE

1
 2
 3
 4 I HEREBY CERTIFY that the witness
 5 was duly sworn by me and that the
 6 deposition is a true record of the
 7 testimony given by the witness.
 8
 9
 10
 11
 12

13 Lori A. Zabielski
 14 Registered Professional Reporter
 15 Dated: MAY 17, 2009
 16
 17
 18
 19

20 (The foregoing certification
 21 of this transcript does not apply to any
 22 reproduction of the same by any means,
 23 unless under the direct control and/or
 24 supervision of the certifying reporter.)

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EXAMINATION

1
 2 - - -
 3 BY MR. CANDON:
 4 Q. Mr. Austern, you had
 5 mentioned that you reviewed Mr. Biggs'
 6 estimation report, and the figure was
 7 somewhere exactly between, you said, 3
 8 and 5 billion?
 9 A. Let me explain. There was a
 10 follow-up letter to the report. The
 11 report I believe said 3.8, and it was
 12 reduced to 3.6 because of the
 13 mathematical error.
 14 Q. Did she provide a separate
 15 estimate for Libby claims?
 16 A. No, she did not.
 17 MR. CANDON: Okay. That's
 18 all I have. Thank you.
 19 MR. GUY: Okay. We are
 20 done.
 21 (The deposition concluded at
 22 3:27 p.m.)
 23
 24

INSTRUCTIONS TO WITNESS

1
 2
 3 Please read your deposition over
 4 carefully and make any necessary
 5 corrections. You should state the reason
 6 in the appropriate space on the errata
 7 sheet for any corrections that are made.
 8

9 After doing so, please sign the
 10 errata sheet and date it.

11 You are signing same subject to the
 12 changes you have noted on the errata
 13 sheet, which will be attached to your
 14 deposition.

15 It is imperative that you return
 16 the original errata sheet to the deposing
 17 attorney within thirty (30) days of
 18 receipt of the deposition transcript by
 19 you. If you fail to do so, the
 20 deposition transcript may be deemed to be
 21 accurate and may be used in court.
 22
 23
 24